SUPREME COURT, U. S.

APR 28 1975

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974

NO. 74-1354

DUDLEY WIDEMAN, Administrator
of the Estate of Claude Wideman,
Deceased, Petitioner,

v.

MISSISSIPPI VALLEY GAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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April 25, 1975

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SUPREME COURT OF THE UNITED STATES
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The petitioner, Dudley Wideman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 30, 1975.

OPINION BELOW

The opinion of the Court of Appeals appears in 507 F.2d 658 (5th Cir. 1975) and is attached hereto as Appendix A. No written opinion was rendered by the District Court for the Northern District of Mississippi.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 30, 1975. There was no petition for rehearing filed. This petition for certiorari was filed within 90 days of January 30, 1975. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied his 7th Amendment right to a trial by jury by the action of the Court of Appeals in affirming the District Court's grant of a judgment n.o.v. to the defendant gas company.

2. Whether petitioner was denied due process of law when after trial and jury verdict in his favor, the District Court granted the defendant gas company a judgment n.o.v. adopting as its basis therefor a different rule of law from that under which the case was tried, no objection at trial being made by the defendant gas company to the rule of law used at trial.

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Constitution Amendment 7:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

2. U.S. Constitution Amendment 5:

[for complete text see Appendix "B"; pertinent provision is as follows:]

> No person. . .shall be. . . deprived of life, liberty, or property, without due process of law;. . . .

STATEMENT OF THE CASE

Dudley Wideman, as administrator of the estate of Claude Wideman, deceased, brought suit in the District Court of

the Northern District of Mississippi against Mississippi Valley Gas Company. Federal jurisdiction was predicated upon 28 U.S.C. sec. 1332, commonly known as diversity of citizenship, the plaintiff and the defendant being citizens of different states. R. 405, 406. The case began in the said District Court on August 22, 1973, and was tried before a six person jury (pursuant to said Court's rules). R. 8, 10.

The complaint charged Mississippi Valley Gas Company (hereinafter "the gas company") with negligence in causing the death of Claude Wideman. The jury was so instructed. R. 402. The Court charged the jury that the duty allegedly breached by the gas company was that of "ordinary care required of a reasonably prudent operator of a gas transmission line. . . ." R. 407. It was upon that standard of care that the case was con-

sidered by the jury. R. 426. The jury retired, deliberated, and returned a verdict for the plaintiff, Dudley Wideman, in the amount of $100,000.00. R. 426, 427.

After the plaintiff rested his case the gas company moved for a directed verdict in its favor. R. 176, 186-188. After the motion was made in chambers the following occurred:

> "THE COURT: May I inquire what is the defendant's standard? Is the standard of care in gas operation ordinary or of the highest?
>
> MR. HOLLAND: (attorney for the gas company, defendant) Ordinary.
>
> THE COURT: Motion is overruled.
>
> MR. HOLLAND: All right." R. 188.

The gas company presented its evidence and rested. R. 315. The plaintiff presented some rebuttal evidence and rested. R. 364. In chambers the gas company again moved for a directed verdict. R. 366-368. The motion was overruled. R.

368. In discussing the instructions requested by the gas company the Court told all counsel that he believed the standard of ordinary care controlled in this case. No objection was then made by any counsel. R. 373, 374. The Court charged the jury, R. 394-423, that the standard of care owed by the gas company to the decedent was that of ordinary care. Neither plaintiff nor defendant took exception to the Court's charge. R. 423.

The gas company filed a motion for a judgment n.o.v. or a new trial. The hearing was held on September 12, 1973. The Court there concluded that the correct standard or legal duty to be applied to this case was not the duty of ordinary care, but only the duty owed to a gratuitous licensee which is to refrain from wanton or willful injury to the licensee. (5th Cir.App. 2, 3, 6). An appropriate order was entered sustain-

ing the gas company's motion for a judgment n.o.v. (5th Cir.App. 187). From that order Dudley Wideman appealed to the United States Court of Appeals for the Fifth Circuit. That Court's opinion and judgment, affirming the District Court's granting of a judgment n.o.v. to the gas company is found in Appendix A to this petition. From that judgment, Dudley Wideman petitioned this Court to review the Fifth Circuit's judgment by writ of certiorari, timely filed.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS BASED UPON THE IMPORTANT FEDERAL QUESTION OF WHETHER IN DIVERSITY CASES, FEDERAL COURTS SHOULD APPLY A FEDERAL RATHER THAN A STATE TEST FOR THE SUFFICIENCY OF EVIDENCE NECESSARY TO CREATE A JURY QUESTION, AND WHAT THE PROPER TEST IS, IN RELATION THERETO, IN CONNECTION WITH MOTIONS FOR A DIRECTED VERDICT AND FOR JUDGMENT N.O.V.. THE FIFTH CIRCUIT COURT OF

APPEALS HAS DECIDED THOSE ISSUES IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, AND IN A WAY WHICH CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS RELATING TO THESE SAME ISSUES.

The decision below is grounded upon the Fifth Circuit Court of Appeals' decision in the case of Boeing Company v. Shipman, 411 F.2d 365 (5th Cir. 1969). Sitting En Banc that Court stated that it was well settled in the Fifth Circuit that in diversity cases federal courts apply a federal rather than a state test for the sufficiency of evidence to create a jury question. It noted that the Circuits are divided on that question, i.e., federal v. state test in determining the sufficiency of the evidence for submission to the jury. 411 F.2d at p. 368. The Court further decided that the standard to be applied in diversity cases, to determine whether there is sufficient

evidence to submit the case to the jury on motions for directed verdicts and for judgment notwithstanding the verdict, is not the same in all diversity cases. The standard differs in FELA (45 U.S.C. sec. 51 et seq.) and Jones Act (46 U.S.C. sec. 688) cases, and all other diversity cases which are not based on statute. In fact the Court said as to these two classes of cases: ". . .the formulation of the test of sufficiency of evidence is substantially different." 411 F.2d at p. 373. (emphasis supplied).

The original opinion in the Boeing case, supra (411 F.2d 365) was based upon the case of Planters Manufacturing Co. v. Protection Mutual Ins. Co., 380 F.2d 869 (5th Cir. 1967). The Planters' rationale on the sufficiency of evidence test was based upon the language of this Court in the case of Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916

(1946). The Fifth Circuit, in rejecting the principles enunciated in the Planters' case, supra (380 F.2d 869), on this question, also rejected this Court's reasoning and conclusions in Lavender v. Kurn, 327 U.S. 645 (1946). The Court was explicit, saying that we now reject the Planters principle and hold that the FELA test is peculiar to that kind of case as a consequence of the statute itself and is accordingly not applicable in non-FELA jury trials. 411 F.2d at p. 372.

The Court then proceeded to adopt "the" standard to be used in determining whether there is sufficient evidence to submit a case to the jury in connection with motions for directed verdicts and for judgment notwithstanding the verdict in federal diversity cases which are not based on statute, e.g., non-FELA federal cases. 411 F.2d at p. 373-375. The

question of sufficiency of the evidence to require submission of a case to the jury presents a constitutional problem. 411 F.2d at p. 377. As Circuit Judge Rives noted, when the majority of the Court repudiates for diversity cases the FELA standard and particularly the formula adopted in Lavender v. Kurn, 327 U.S. 645 (1946), it commits an error of constitutional proportions. 411 F.2d at p. 377, 378.

Thus, when the majority of the Fifth Circuit promulgated what it considered to be the standard for determining the sufficiency of evidence necessary to require the submission of a case to the jury, it acted beyond its authority. It expressly overruled this Court's sufficiency test set out in Lavender v. Kurn, 327 U.S. at p. 653. The standard so adopted in the Boeing case, supra (411 F.2d 365) was applied in the case

question of sufficiency of the evidence to require submission of a case to the jury presents a constitutional problem, all F.2d at p. 377. As Circuit Judge Rives noted, when the majority of the Court repudiates for diversity cases the FELA standard and particularly the formula adopted in Lavender v. Kurn, 327 U.S. 645 (1946), it commits an error of constitutional proportions. all F.2d at p. 377, 378.

Thus, when the majority of the Fifth Circuit promulgated what it considered to be the standard for determining the sufficiency of evidence necessary to require the submission of a case to a jury, it acted beyond its authority. It expressly overruled this Court's application of the standard set out in Lavender v. Kurn, 327 U.S. at p. 653. The standard so adopted in the boeing case, supra (all F.2d 365) was applied in the case

sub judice. It is submitted that the 7th Amendment speaks of no double standard as to the sufficiency of evidence necessary to take a case to a jury. It is further submitted that the time is ripe for this Honorable Court to so declare. A decision by this Court clearly defining the sufficiency of evidence required to make a jury issue in all federal diversity cases, statutory and non-statutory, would be of great importance and assistance to all the lower federal courts and would lend itself greatly to a uniform application of a constitutional right of utmost importance to every citizen of these United States.

In the case sub judice the Fifth Circuit's judgment, affirming the granting of a judgment n.o.v. by the District Court in favor of the gas company, was based upon: (1) the only duty owed the deceased by the gas company was to re-

frain from willfully and wantonly injuring him, and (2) on the record before it, based on the duty in (1) above, reasonable men could not differ about the fact that there was no showing the gas company breached the duty it owed the decedent. App. 3. In reaching conclusion (2) above the Court invaded the province of the jury, contrary to the 7th Amendment. In applying the duty in (1) above, the Court denied Dudley Wideman due process of law under the 5th Amendment. The District Court also did so.

Many decisions say that an instruction not objected to becomes the law of the case. This may be merely one way of phrasing the general principle that failure to object ordinarily bars later challenge to an instruction. 9 Wright & Miller, Federal Practice and Procedure, sec. 2558 p. 670, 671 (1971); Green v.

American Tobacco Company, 325 F.2d 673, 676 (5th Cir. 1963), cert. denied 377 U.S. 943, 84 S.Ct. 1349, 1351, 12 L.Ed. 2d 306 (1964); United States v. Atkinson, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936). Further, however, a party who requests an instruction has invited any error in it and cannot complain if the instruction, or one substantially like it is given. 9 Wright & Miller, Federal Practice and Procedure, sec. 2558, p. 675 (1971); Hargrave v. Wellman, 276 F.2d 948, 950, 951 (9th Cir. 1960); Mercelis v. Wilson, 235 U.S. 579, 35 S.Ct. 150, 59 L.Ed. 370 (1915). In such a case there is deemed to be no error. In addition the general rule is that an appellate court will not entertain an argument based upon a theory not litigated below. Hutton v. United States, 501 F.2d 1055, 1062 (6th Cir. 1974); Laguna Royalty Co. v. Marsh, 350 F.2d 817, 825, 826 (5th Cir.

1965); Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958).

In the case sub judice the defendant gas company told the District Court what standard of care applied to this case, R. 188, at the close of the plaintiff's case, and again at the close of all the evidence. R. 366, 367. The Court charged the jury on the standard of ordinary care, R. 394-423. No exceptions to the charge were voiced by the defendant, gas company. R. 423. The jury returned a verdict for the plaintiff in the amount of $100,000.00. R. 426, 427. Thus, the law of the case was established, i.e., ordinary care, and there are many factual issues creating a jury issue on the breach of that duty in this record. The District Court and the Court of Appeals acknowledged that fact. App. 2, 5, 6. The disturbance of those facts resolved in plaintiff's favor by

the jury, by the District Court and the Court of Appeals was a gross invasion of the province of the jury. This is a violation of the 7th Amendment to the Constitution. There was no error of law to be considered. The gas company in effect invited error by not pleading the standard of care urged by it on its motion for judgment n.o.v.

Dudley Wideman was denied due process of law as well. In effect the gas company on its motion for judgment n.o.v. urged a new defense to the suit. At that point in time the plaintiff was precluded from offering any evidence to rebut the new defense. In this instance the defendant must be bound by the theories under which the case was tried. To allow the gas company to urge a new theory, after trial, upon the Court, certainly cannot be condoned or permitted. Kay v. United States, 303 U.S. 1, 58 S.Ct. 468, 82 L.Ed.

607 (1938).

CONCLUSION

The basis of the Fifth Circuit Court of Appeals' review of the case sub judice under its decision in the case of Boeing Company v. Shipman, 411 F.2d 365, 373-377 (5th Cir. 1969) is unconstitutional. It is diametrically opposed to this Court's decision in the case of Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946). Both lower Courts invaded the province of the jury--a violation of the 7th Amendment. The defendant gas company invited any alleged error, and thus on appeal there was no error. The question of the sufficiency of evidence to make a jury issue in all federal diversity cases, statutory and non-statutory, has not been answered by this Court. This case presents the Court with the opportunity to

do so. For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX "A"

Dudley WIDEMAN, Administrator
of the Estate of Claude Wideman,
Deceased, Plaintiff-Appellant

v.

MISSISSIPPI VALLEY GAS COMPANY,
Defendant-Appellee.

No. 73-3574

United States Court of Appeals,
Fifth Circuit.

Jan. 30, 1975.

Appeal from the United States District Court for the Northern District of Mississippi.

Before COLEMAN, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

Claude Wideman was killed in an explosion and fire resulting when a small road grader he was operating on a private residential lot hit an underground gas line. The outcome of this

appeal turns on a determination of the standard of care owed to Wideman by the defendant gas company under Mississippi law. The jury, instructed that the gas company owed a duty of ordinary care, apparently decided that the gas line easement was not adequately marked and the line itself was not a sufficient depth below the ground. Wideman's estate was awarded the sum of $100,000. Notwithstanding this jury verdict, the trial court entered a judgment for defendant on the ground that the jury had been incorrectly instructed as to the standard of care. The court held that the gas company owed no higher duty under the circumstances than to refrain from wanton or willful injury to decedent, and that the evidence was not sufficient for jury consideration under such correct standard. We affirm.

[1] Essentially, we decide two points: first, a gas company with gas lines buried within the boundaries of a legal easement owes to a person making an unforeseeable extraordinary use of the surface no duty higher than to refrain from willful and wanton injury, unless and until it has notice of that proposed use; and second, on the record before us, the trial court was correct in the determination that the evidence was such that reasonable men could not differ on the facts that the gas company had received no notice of the extraordinary use and that it had not breached its duty to refrain from willful or wanton conduct.

In 1930 Mississippi Valley Gas Company's predecessor-in-interest acquired a valid gas line right-of-way across some property in northern Mississippi which is presently owned by

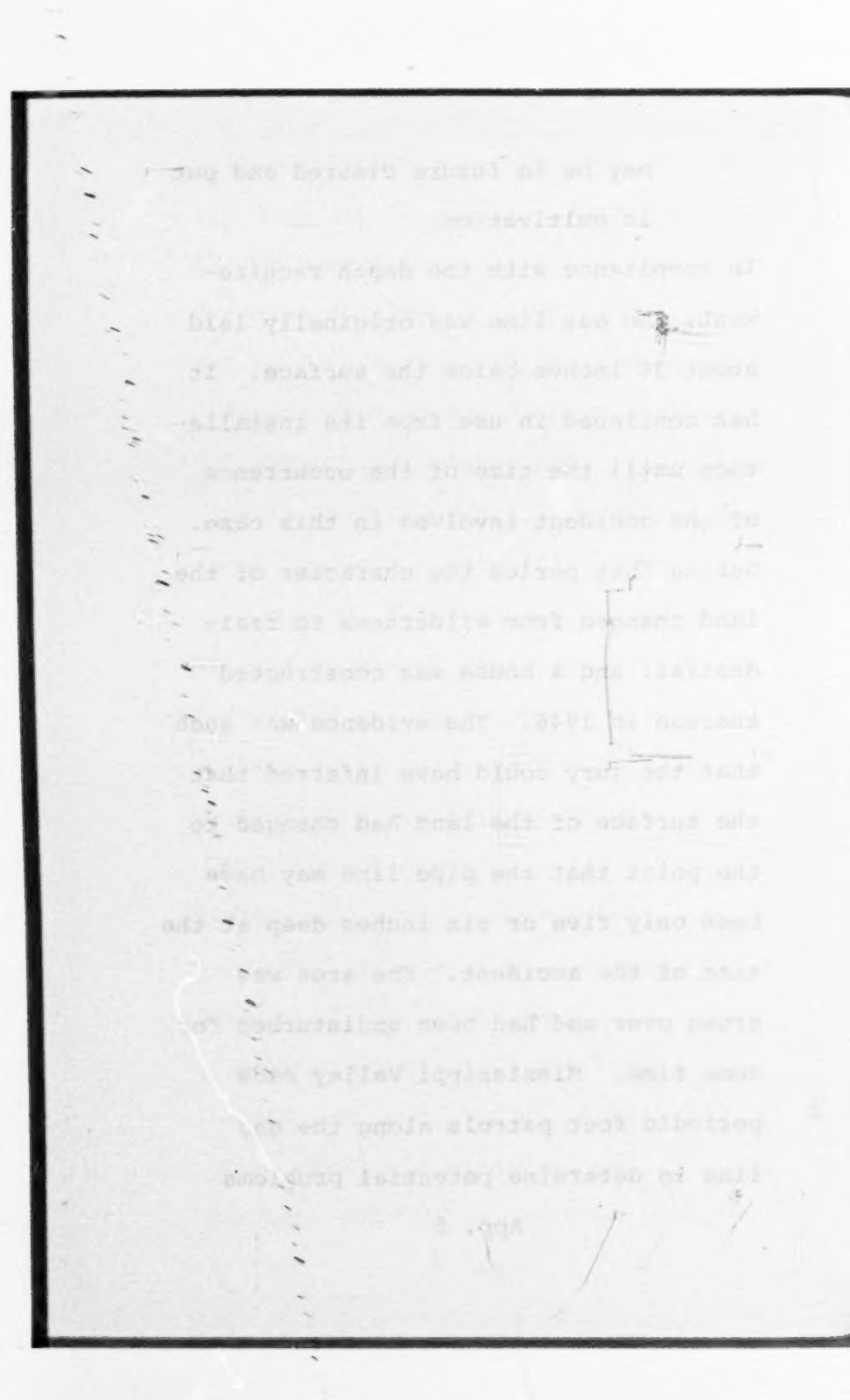
Tommy D. Beasley. The recorded easement conveyed a "right of way to lay, construct, maintain and operate a pipeline" across lands containing seventeen acres described in quarter section terms. The exact path of the easement was not described. The owner reserved the "use and enjoyment of said premises except for the purposes herein conveyed to purchaser." The document further provided that the pipeline was to be laid below plow depth (agreed by the parties to this litigation to be below six inches), with the following paragraph:

> It is understood and agreed that purchaser (the gas company) shall bury said pipe line below plow depth wherever it crosses any land that may be cleared and in cultivation, and shall also bury said pipe line below plow depth across any land that

App. 4

may be in future cleared and put in cultivation.

In compliance with the depth requirement, the gas line was originally laid about 36 inches below the surface. It has continued in use from its installation until the time of the occurrence of the accident involved in this case. During that period the character of the land changed from wilderness to residential, and a house was constructed thereon in 1946. The evidence was such that the jury could have inferred that the surface of the land had changed to the point that the pipe line may have been only five or six inches deep at the time of the accident. The area was grown over and had been undisturbed for some time. Mississippi Valley made periodic foot patrols along the gas line to determine potential problems



from erosion, construction, and the like, but there were no signs marking the path of the line except where it crossed a public highway some distance from the point of the accident.

On April 17, 1971, Claude Wideman was operating a road grader on the Beasley property in response to Beasley's request for county assistance in alleviating a drainage problem created by water running off the city-maintained road immediately in front of his property. While Beasley was aware of the general location of the pipe line on his property, neither he nor decedent contacted Mississippi Valley to ascertain the exact location of the line. Mississippi Valley was not otherwise made aware of the fact that decedent intended to operate the road grader over the gas line. After making a few passes with the grader,

decedent struck the gas line with the grader blade and the line ruptured, causing an explosion and fire which resulted in decedent's unfortunate death a short time later.

[2] We agree with District Judge William C. Keady that under the circumstances of the above accident, the defendant was entitled to judgment as a matter of law. Absent willful or wanton misconduct, the defendant could not be charged with fault of inaction until it had notice of the "hazard about to be experienced." Although there is little Mississippi law on the subject, the Supreme Court of Mississippi appears to recognize that in the operation of a gas line, some accidents and injuries are too remote and unforeseeable for a defendant to be held legally liable therefor. As said in a recent case involving a pipe line accident:

"The rule is firmly established in this state, as in nearly all the common law states, that in order that a person who does a particular act which results in injury to another shall be liable therefor, the act must be of such character and done in such a situation, that the person doing it should reasonably have anticipated that some injury to another will probably result therefrom, D'Antoni v. Albritton, 156 Miss. 758, 766, 126 So. 836; Williams v. Lumpkin, 169 Miss. 146, 152, 152 So. 842; but that the actor is not bound to a prevision or anticipation which would include an unusual, improbable, or extraordinary occurrence, although such happening is within the range of

possibilities. Illinois Cent. R. Co. v. Bloodworth, 166 Miss. 602, 617, 145 So. 333;. . ."

Larco Drilling & Fxploration Corp. v. Brown, 267 So.2d 308, 310 (Miss. 1972), quoting Mauney v. Gulf Refining Co., 193 Miss. 421, 9 So.2d 780 (1942) (emphasis added).

In Larco Drilling, the Supreme Court held that a county employee operating a bulldozer which struck the defendant's gas line, thus causing the operator's injuries was a mere licensee and reversed a verdict in his favor and rendered judgment for the owner of the gas line. The county employee was attempting to fight a forest fire at the time but his presence was unknown to the gas line owner.

Unless the likelihood of some accident or injury of the type which occurred in this case was reasonably foreseeable

by Mississippi Valley, it was under no duty to take action to avoid such an accident. Mississippi Valley had duly recorded its easement on the county land records, thus giving full legal notice of the presence of the pipe line on the Beasley property. It could reasonably be expected that anyone planning use of the property would be aware of the pipe line's existence, if not its location. It could not be foreseeable by defendant that one knowing of the pipe line would excavate the property without inquiring of Mississippi Valley of the exact pipe line location.

There can be little doubt that had Beasley or decedent inquired about the location of the gas line or in any other way conveyed to Mississippi Valley any information from which it could have concluded that the easement was to be

by Mississippi Valley, it was under no
duty to take action to avoid such an
accident. Mississippi Valley had duly
recorded its easement on the county
land records, thus giving full legal
notice of the presence of the pipe line
on the Dooley property. It could
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information from which it could have
concluded that the easement was to be

graded, Mississippi Valley would have been under a duty to take some action--for example, warning of the danger involved, marking the location of the line, or relocating it at a greater depth--to prevent an accident such as the one which did occur.

See Young v. Herrington, 312 S.W. 2d 685, 687 (Tex.Civ.App. 1958). But the record is clear that no one did anything to place Mississippi Valley on actual or constructive notice of the possibility of this particular road grader activity. Without such notice, a duty for defendant to take action could arise only if this type of accident and injury could have been reasonably anticipated. No duty would arise as to any "unusual, improbable, extraordinary and freakish accident" that, even though possible, a reasonable man would not have considered probable.

Larco Drilling, supra, 267 So.2d at 310.

Other than Larco Drilling, there is little authority from the Mississippi courts from which to evaluate what they would consider as meeting this threshold test of foreseeability in a case of this type. The courts of Texas, which have handled a large number of oil and gas transmission line cases, have had greater opportunity to develop the scope of foreseeability in this unique area.

[3] Texas views the issue of reasonable foreseeability in pipe line cases as centering on whether the use being made of the surface of the right-of-way is one that is ordinary, or one that is extraordinary, considering the character and location of the land. The operator has a duty to maintain the pipe line so that it will be safe for those making an ordinary use of the land, but anyone making an extraordinary use of the sur-

face has the initial burden of either avoiding the pipe line or notifying the operator, who must then take steps to prevent contact. Phillips Pipe Line Co. v. Razo, 420 S.W.2d 691 (Tex. 1967); Pioneer Natural Gas Co. v. K & M Paving Co., 374 S.W.2d 214 (Tex. 1963). The language used by the Texas Supreme Court is very similar to that used by the Supreme Court of Mississippi in Larco Drilling, suggesting the two courts substantively view the issue in identical terms. The initial question becomes then, whether the explosion in the instant case was caused by an ordinary use of the surface.

We are not here confronted with a road grader performing routine maintenance along a public thoroughfare, compare Concho Construction Co. Inc. v. Oklahoma Natural Gas Co., 201 F.2d 673 (10th Cir. 1953), but with a scraper operating some

distance from and not parallel to the road. See generally, Annot., 30 A.L.R. 3d 685 (1970). Plaintiff asserts that the use of county graders to alleviate drainage problems on private property is not uncommon in northeast Mississippi, but this does not make the use of construction equipment "ordinary" in the sense that it should be anticipated by the defendant without special notice. Cf. Phillips Pipe Line, supra.

"Ordinary" connotes a use that is "usual," "regular," and "normal," something of a continuing nature so that a person should be familiar with it. A basement may be dug when a house is built but a house is not built on any particular lot with sufficient frequency to say that the digging of the basement is an "ordinary use" of that lot. Since Mississippi Valley's liability must be defined by its conduct with respect to the

Beasley property, the issue is what might be an ordinary use of the property.

What could ordinarily be expected in a semi-rural area might be the operation of automobiles on a dirt driveway over the pipe line, or someone planting a garden. We do not consider the excavation made of the surface here, however, as such that the defendant should be charged with protecting against it in the operation and maintenance of its pipe line. To hold it accountable in this circumstance would impose too heavy a responsibility for an occurrence that was only remotely and slightly probable under Larco Drilling.

Additional support for this view is found in that line of cases involving the operation and maintenance of uninsulated electric transmission lines. In these cases the courts appear to focus on the location of the accident and the

forseeability, in that location, of the conduct of the injured party from which the injury arises. See generally Mississippi Power & Light Company v. Shepard, 285 So.2d 725 (Miss. 1973).

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1974

No. 73-3574

D. C. Docket No. CA-71-147K

DUDLEY WIDEMAN, Administrator of the Estate of CLAUDE WIDEMAN, Deceased, Plaintiff-Appellant,

versus

MISSISSIPPI VALLEY GAS COMPANY, Defendant-Appellee.

Appeal from the United States
District Court for the
Northern District of Mississippi

Before
COLEMAN, CLARK and RONEY, Circuit
Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

January 30, 1975

Issued as Mandate: February 21, 1975

Northern District of Mississippi
Filed

Feb 26 1975

Norman L. Gillespie, Clerk

By /s/ S. Lumpkin
Deputy

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/ Louise Wolf
Deputy Feb 21 1975

New Orleans, Louisiana

APPENDIX "B"

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment 5

CERTIFICATE OF SERVICE

I hereby certify that on this the 25th day of April, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Ralph Holland, Esq., a member of the firm of Lumpkin, Holland and Ray, 112 North Broadway Street, P.O. Drawer 409, Tupelo, Mississippi, 38801, attorney of record for the respondent. I further certify that all parties required to be served have been served.

JOE H. DANIEL
405 Tombigbee Street
P.O. Box 1084
Jackson, Mississippi 39205

COUNSEL FOR PETITIONER

SUPREME COURT, U. S.
MAY 27 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974

NO. 74-1354

DUDLEY WIDEMAN, Administrator
of the Estate of Claude Wideman,
Deceased, Petitioner

V.

MISSISSIPPI VALLEY GAS COMPANY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

John M. Kuykendall, Jr.
Minor C. Sumners, Jr.
Overstreet & Kuykendall
P. O. Box 961
Jackson, Mississippi 39205

COUNSEL FOR RESPONDENT

May 28, 1975

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974

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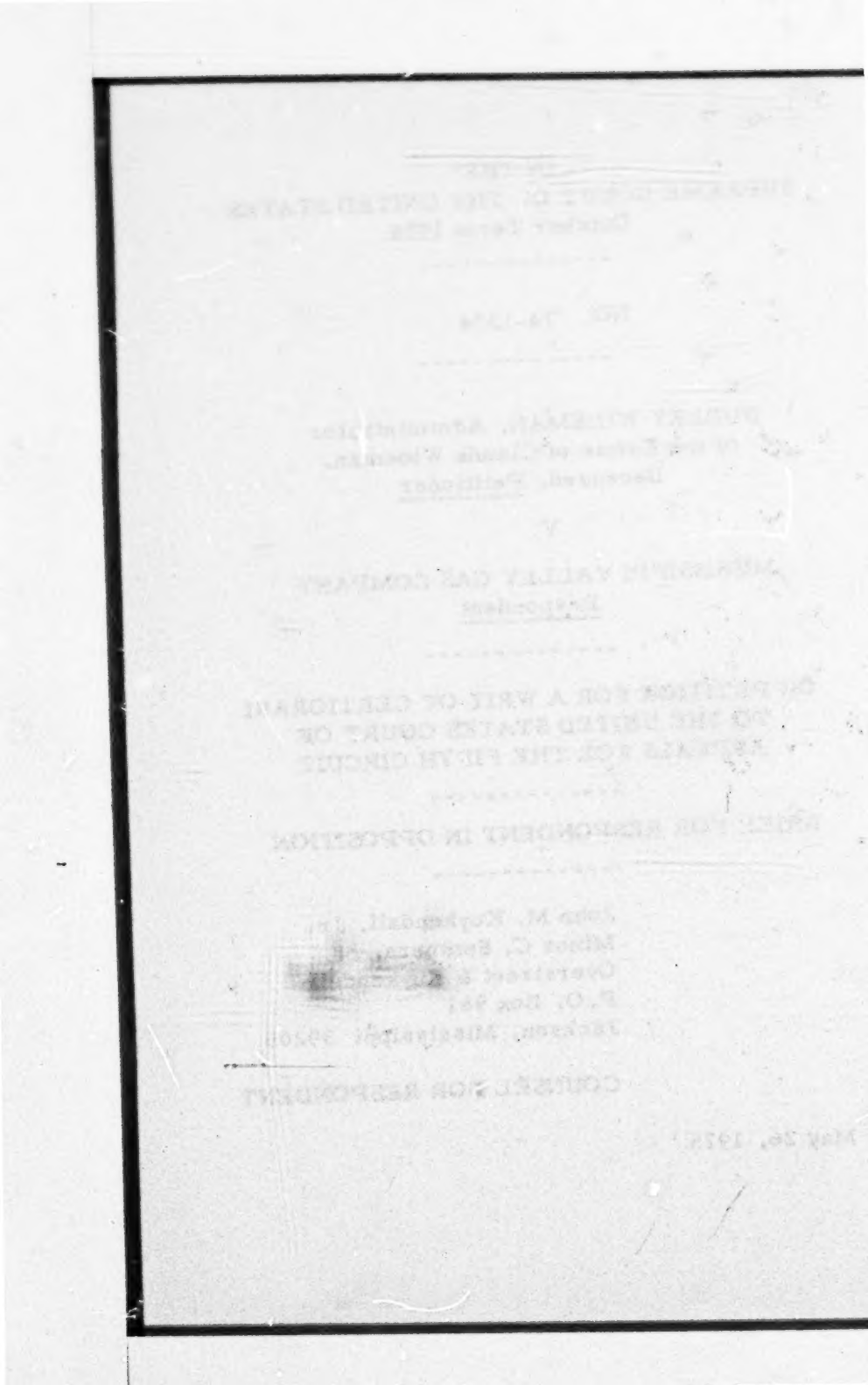
May 26, 1975



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Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, Mississippi Valley Gas Company, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in this proceeding be denied.

OPINION BELOW

The opinion of the Court of Appeals appears in 507 F. 2d 658 (5th Cir. 1975) and is appended to the Petition for Writ of Certiorari. No written opinion was rendered by the District Court for the Northern District of Mississippi, but the Court's verbal opinion as dictated into the record appears at page 3, et seq. in the appendix filed in the Fifth Circuit.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

The questions presented in the Petition were not raised in the Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent submits that no constitutional provisions are involved or constitutional questions properly before this Court in this case, it

nowhere appearing in the record that such constitutional rights were asserted or claimed violated in the trial court or the Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

The statement of the case set out in the Petition fails to set out the following particulars material to the issue presented:

(1) That one of the grounds presented in Respondent's motion for a directed verdict at conclusion of all testimony for both sides was that the deceased, Claude Wideman, was a trespasser on the valid gas right-of-way easement and that the Company owed no duty to a trespasser. R. 368. In granting the Motion for Judgment Notwithstanding the Verdict (n.o.v.), the Trial Judge held the Court had erred and that the "...correct standard or legal duty under these undisputed circumstances was not the duty

of ordinary care, but only the duty owed to a gratuitous licensee, which is to refrain from willful or wanton injury to the Licensee." (5th Cir. App. 6)

(2) Further, in discussing the instructions requested by the gas company the Court stated:

> "THE COURT: Request Number Eight, I do not believe is good law and I am going to refuse it. I don't think the defense is entitled to that instruction.
>
> "Request Number Nine suggests the grounds previously urged on the Court, that if any surface use was made of that property, then the user would have the status of a trespasser only, and the duty of the gas company -- I understood defense counsel to say earlier that the standard of ordinary care controlled in this case. I believe that was the answer given to the Reporter at the conclusion of the plaintiff's testimony.
>
> "MR. HOLLAND: If the Court please --

"THE COURT: Be that as it may, I won't hold you to it. I'm going to refuse Request Number Nine. I do think it is the standard of ordinary care and not the standard only to a trespasser." R. 373, 374.

ARGUMENT

POINT I

The Petition sets out questions not raised in the Court of Appeals.

The questions of whether Petitioner was denied his Seventh Amendment right to a trial by jury by the granting of a judgment n.o.v. to Respondent or whether Petitioner was denied due process of law by the granting of the judgment n.o.v. adopting as the basis therefor a different rule of law from that under which the case was tried were not presented in the Court of Appeals.

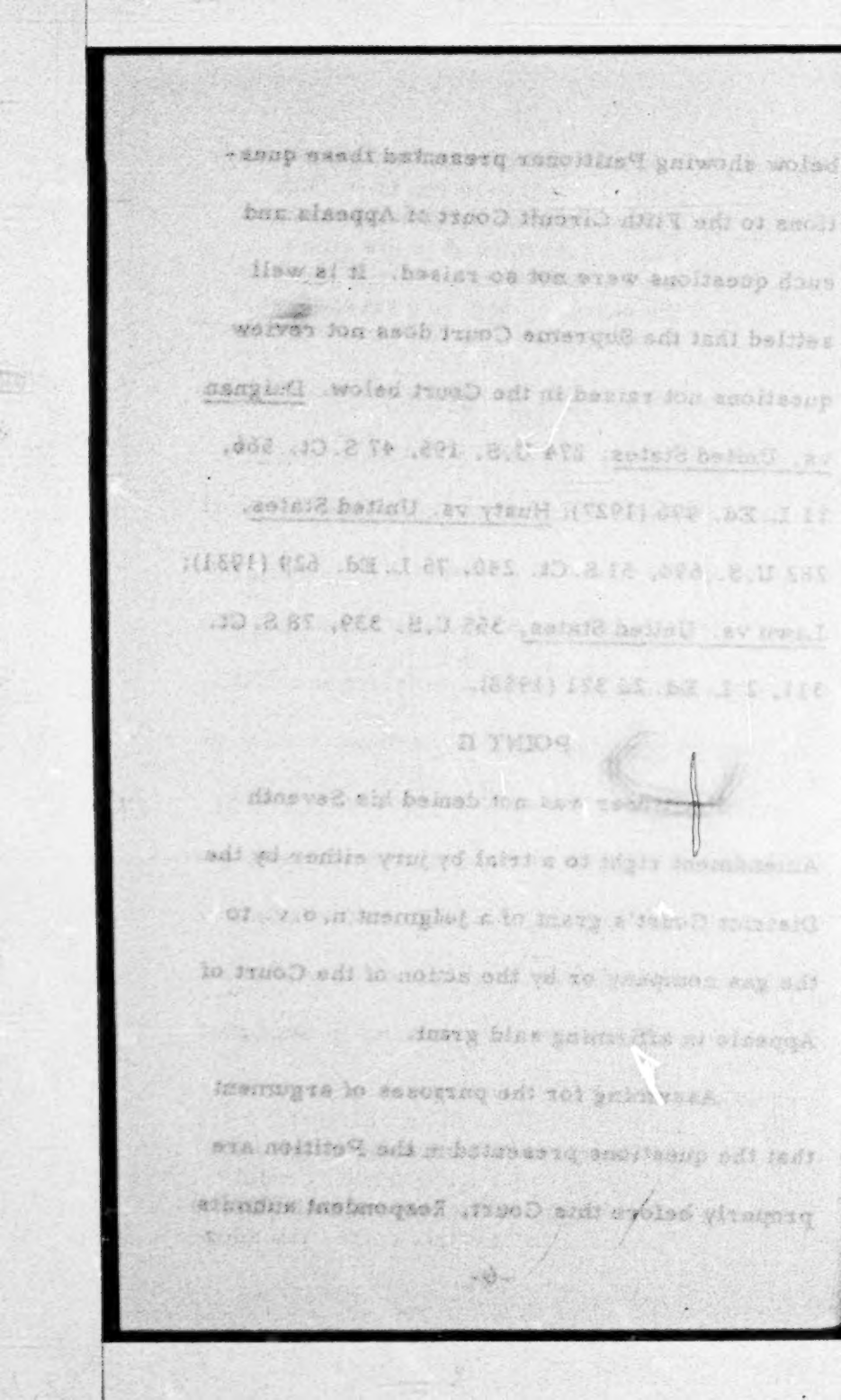
The Petitioner's statement of the case fails to cite any part of the record in the Court

below showing Petitioner presented these questions to the Fifth Circuit Court of Appeals and such questions were not so raised. It is well settled that the Supreme Court does not review questions not raised in the Court below. Duignan vs. United States, 274 U.S. 195, 47 S.Ct. 566, 71 L.Ed. 996 (1927); Husty vs. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629 (1931); Lawn vs. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed. 2d 321 (1958).

POINT II

Petitioner was not denied his Seventh Amendment right to a trial by jury either by the District Court's grant of a judgment n.o.v. to the gas company or by the action of the Court of Appeals in affirming said grant.

Assuming for the purposes of argument that the questions presented in the Petition are properly before this Court, Respondent submits



that there is no merit to the question of whether Petitioner was denied his Seventh Amendment right to a trial by jury.

It is well settled that the granting of a judgment n.o.v. does not infringe on the Seventh Amendment right to a trial by jury. Moore's Federal Practice, Vol. 5A, Section 50.07 (1) at page 2354, contains the following in this regard:

> "Even in the absence of a flat holding by the Supreme Court, the constitutionality of the procedure sanctioned by Rule 50(b) can not be doubted. ***"

In Manaia vs. Potomac Electric Power Co., 268 F.2d 793, 798-99 (4th Cir. 1959), cert. denied, 361 U.S. 913, 80 S.Ct. 255, 4 L.Ed.2d 183, the Court stated:

> "Finally, it is said that granting these judgments n.o.v. was a denial of the plaintiffs' rights under the Seventh Amendment. It is apparent from their brief, however, that the learned counsel for the plaintiffs have no deluding impression that this contention adds

anything of substance to their position. They seem to recognize that no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitutional principle into the familiar process of appraisal of evidence and its associated inferences.

"Were a court indifferent to the established basis upon which powers have been allocated between the court and jury or beguiled into rejection of every view which seemed to it less reasonable than its own, a violation of constitutional right might well be said to have occurred. The District Court, here, however, was conscious of the limitations of its power, and conscientious and

> objective in its exercise. Citing Burcham v. J.P. Stevens & Co., 4 Cir., 209 F.2d 35, he approached the problem 'in the light of the admonition of the Court of Appeals of this Circuit as to the limited authority of trial judges to disturb jury verdicts,' as do we. [163 F. supp. 672.] Even the plaintiffs describe his approach as 'fair-minded.' The attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this. See the opinion of Mr. Justice Frankfurter in Dick v. New York Life Insurance Co., 359 U.S. 437, 79 S.Ct. 921, 3 L. Ed. 2d 935; Smith v. Reinauer Oil Transport, Inc., 1 Cir., 256 F. 2d 646."

Petitioner attempts to rewrite Judge Roney's opinion for the Fifth Circuit by claiming it was grounded on Boeing Company v. Shipman, 411 F. 2d 365 (5th Cir. 1969), a case not mentioned in the decision, and arguing the question of "whether in diversity cases, Federal Courts should apply a federal rather than a state test for the sufficiency of evidence necessary to

create a jury question, and what the proper test is, in relation thereto, in connection with motions for a directed verdict and for judgment n. o. v." Petitioner asserts that the Fifth Circuit has decided these issues in a way which conflicts with the decisions of this Court and with the decisions of other Courts of Appeals. Again, Respondent submits that these issues were not raised or argued in the court below and should not be considered here and further that these questions are not fairly comprised in the question presented for review.

Respondent submits that there is no merit to the position of Petitioner, if the questions raised be properly before this Court for consideration.

Respondent submits that whether a state test or a federal test was applied would have made no difference in the decision reached in

this case. The Mississippi Supreme Court, in the case of Butler v. Crestman, Miss., 264 So. 2d 812 (1972) stated the test as follows:

> "In this state all questions of negligence and contributory negligence are determined by the jury. Miss. Code 1942 Ann. § 1455 (1956). The rule relating to the propriety of granting a directed verdict or peremptory instruction has been announced many times by this Court. We said in Mock v. Natchez Garden Club, 230 Miss. 377, 382, 92 So. 2d 562, 563 (1957):
>
> "[T]hat if reasonable men might have a difference of opinion as to whether or not the negligence of the actor constituted a substantial factor in bringing about the injury, then the question is for the jury. We have also held repeatedly in cases too numerous to mention that upon a motion for a directed verdict all the facts expressly testified to, and all inferences necessarily and logically to be deduced therefrom, are to be taken as true in favor of the party against whom the motion is asked, and that a case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly

taken of the facts which the evidence tends to establish, and further that if more than one reasonable inference can be drawn from the facts the question of negligence is for the jury.***"

Respondent submits that there is no difference in this test and the test applied by the District Court and the Court of Appeals in this case.

Further, Petitioner's argument is not based on whether a state or federal test should be applied. He adopts the view that a federal test should be applied and the real issue he then presents is whether this test should be the FELA (Federal Employer's Liability Act) test in all cases, statutory and non-statutory. In the Boeing case, supra (411 F.2d 365) the Fifth Circuit states:

"Although the Supreme Court has not answered the question of law, no Circuit Court of the United States, other than the Fifth Circuit, has held that the

FELA test of sufficiency of evidence is applicable in non-FELA cases. The First Circuit expressly rejected the FELA standard in Dehydrating Process Co. v. A.O. Smith Corp., 1 Cir., 1961, 292 F.2d 653, 656 n. 6, stating that such cases had to be considered 'on their own bottom,' and the Court further said, 'We do not appear to have considered this question ourselves, but a number of other circuits have reached this result without even discussion.' [Citing, inter alia, Rhodes v. Metropolitan Life Insurance Co., 5 Cir. 1949, 172 F.2d 183, cert. denied, 337 U.S. 930, 69 S.Ct. 1495, 93 L.Ed. 1738.] See Gibson v. Elgin, Joliet & Eastern Railway Company, 7 Cir., 1957, 246 F.2d 834 (On Petition for Rehearing); Cahill v. New York, New Haven & Hartford R.R. Co., 2 Cir. 1955, 224 F.2d 637 (Frank J., dissenting).

"Finally, the Seventh Amendment of the United States Constitution providing for trial by jury does not require, either expressly or impliedly, that the test of sufficiency of evidence to create a jury question in a non-FELA federal case be the same as in an FELA case. The tendency of some federal courts, at times, to use overly broad language or to cite indiscriminately

FELA cases in non-FELA situations does not obviate this conclusion. See, e.g. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700-701, 82 S.Ct. 1404, 1411, 8 L.Ed.2d 777 (1962); Harris v. Pennsylvania Railroad Co., 361 U.S. 15, 16, 80 S.Ct. 22, 23, 4 L.Ed.2d 1 (1959) (Mr. Justice Douglas, concurring); Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp., 3 Cir., 1963, 325 F.2d 2, 22.

"The standard provided by the Supreme Court and Circuit Courts in FELA cases for sufficiency of evidence to create a jury question is proper under the Federal Employers' Liability Act, and with this we do not disagree. But in non-FELA federal cases which are not based on statute, the formulation of the test of sufficiency of evidence is substantially different."

The Fifth Circuit, rejecting its earlier decision, then set forth what the proper test should be in determining whether to submit a case to the jury in connection with motions for a directed verdict in federal court and stated the following to be the correct test:

"On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder

of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses."

The District Court's judgment n.o.v. and the Court of Appeals' judgment affirming it meet the requirements of both the state and federal tests on the question of the sufficiency of the evidence to require submission of a case to the jury and there is no conflict among circuits or with the decisions of this Court on this question. We submit that the test announced by this Court in Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946), an FELA case, is for use in an FELA case, as the Fifth Circuit ruled in the Boeing case and as has been held in other cases. Missouri-Kansas-Texas Railway Co. v. Hearson, 422 F.2d 1037 (10th Cir. 1970), Gibson v. Elgin, Joliet & Eastern Railway Company, 246 F.2d 834 (7th Cir. 1957) cert. den. 78 S.Ct. 270, 355 U.S. 897, 2 L.Ed.2d 193, but this question of law is not an issue in this case.

This Court has indicated that the test announced in Lavender v. Kurn is confined to such statutory negligence actions as FELA cases. Rogers v. Missouri Pac. R. Co., 77 S.Ct. 443, 352 U.S. 500, 1 L.Ed.2d 493 (1957). In that case, it is stated that:

> "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases. ***"

POINT III

Petitioner was not denied due process of law when after trial and jury verdict in his favor, the District Court reversed itself and granted the Defendant gas company a judgment n.o.v. adopting as its basis therefor a different rule of law from that under which the case was tried.

Again Respondent submits that this question was not presented or argued in the Court

below and this is not properly before this Court for consideration.

However, answering Petitioner's argument thereon, Respondent submits that Petitioner misapplies the cases he cites on the principle that failure to object bars later challenge to an instruction.

The Court of Appeals for the Fifth Circuit pointed out in a footnote to Gorsalitz v. Olin Mathieson Chemical Corporation, 429 F.2d 1033, 1040 (5th Cir. 1970) as follows:

> "We have considered treating the test prescribed in the court's instruction to the jury as the law of the case under our decision in Green v. American Tobacco Co., 5 Cir. 1963, 325 F.2d 673, 676. However, we do not stop with that test, because we have some doubt as to the applicability of our holding in Green under the facts of the instant case in the light of the well-reasoned decisions of the Eighth Circuit that an instruction to which no objection or only a general objection has been taken does not

> become the law of the case for the purpose of reviewing an order denying a motion for the direction of a verdict. ***"

Wright & Miller, Federal Practice and Procedure, Vol. 9, Sec. 2558, p. 670, 671 (1971) points out:

> "Many decisions say that an instruction not objected to becomes the law of the case. This may be merely one way of phrasing the general principle that failure to object ordinarily bars later challenge to an instruction. It appears to have no meaning beyond that."

At the close of all the evidence, Defendant gas company made a motion for a directed verdict, one of the grounds therefor being that the decedent was a trespasser and no duty was owed him by the gas company. R. 368. The gas company also requested the Court to instruct by its instruction number 9 that the only duty owed was not to injure Wideman willfully, wantonly or through gross negligence, which

was refused. R. 373, 374. Petitioner's position that the later granting of a judgment n.o.v. was a violation of Petitioner's Fifth and Seventh Amendment rights based on "law of the case" arguments is without merit. In Central Steel Tube Co. v. Herzog, 203 Fed.2d 544 (8th Cir. 1953) the court held that the defendant was entitled to have the question of sufficiency of the evidence to go to the jury determined by the applicable law without reference to the instructions given by the court even though the instructions may not have been excepted to by the defendant.

In Coca Cola Bottling Co. of Black Hills v. Hubbard, 203 F.2d 859 (8th Cit. 1953) the following is stated at page 861, 862:

> "The plaintiff asserts that, since no exceptions were taken to the instructions of the court, they became the law of the case for determining the sufficiency of the evidence to support the verdict and judgment, citing Carter Carburetor Corp. v.

Riley, 8 Cir., 186 F.2d 148. The plaintiff's statement, which finds support in many opinions of this Court, is an erroneous statement of the law, and is now expressly disapproved and overruled.

"It is true, of course, that an appellant may not challenge on review the correctness of instructions to which he took no exceptions or only a general exception. Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A.; Palmer v. Hoffman, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L.Ed. 645 and cases cited; Plamer v. Miller, 8 Cir., 145 F.2d 926, 930. In that sense, and in that sense only, it may be said that the instructions to which no exceptions are taken become the law of the case for determining whether the instructions are subject to review on appeal. See Union Pacific Railroad Co. v. Denver-Chicago Trucking Co., Inc., 8 Cir., 202 F.2d 31, 37-38. But in determining whether a trial court has erred in denying a motion for a directed verdict made at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announces the law to be in his instructions. This Court must ascertain for itself what the applicable law is, whether

> the instructions were excepted to or not. A proper motion for a directed verdict and its denial will always preserve for review the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury. In Slocum v. New York Life Insurance Co., 228 U.S. 364, 369-370, 33 S.Ct. 523, 526, 57 L.Ed. 879, it was said that a ruling on a motion for a directed verdict 'is subject to re-examination and approval or disapproval on writ of error in like circumstances and in like manner as are other rulings in matter of law during the course of the trial.' ***"

Respondent submits that the Court of Appeals has not departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision in its affirming of the grant of the judgment n.o.v. herein.

CONCLUSION

For the reasons stated above, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

John M. Kuykendall, Jr.
Minor C. Sumners, Jr.

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Jackson, Mississippi
39205

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of May, 1975, three copies of the Brief for Respondent in Opposition were mailed, postage prepaid, to Joe H. Daniel, Esq., 405 Tombigbee Street, P.O. Box 1084, Jackson, Mississippi 39205, Counsel for Petitioner. I further certify that all parties required to be served have been served.

Minor C Sumners Jr.

MINOR C. SUMNERS, JR.
P.O. Box 961
Jackson, Mississippi 39205

COUNSEL FOR RESPONDENT